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In the Supreme Court of the United States

OCTOBER TERM, 1969

GEORGE M. CHAIKIN, PETITIONER

v.

SELECTIVE SERVICE SYSTEM LOCAL BOARD NO. 66, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

ERWIN N. GRISWOLD,
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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1198

GEORGE M. CHAIKIN, PETITIONER

SELECTIVE SERVICE SYSTEM LOCAL BOARD NO. 66, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. 12-13) and the order of affirmance by the court of appeals (Pet. 10-11) are not reported.

JURISDICTION

The order of the court of appeals was entered on March 12, 1969. The petition for a writ of certiorari

was filed on March 25, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Section 10(b)(3) of the Military Selective Service Act of 1967 (50 U.S.C. App. (Supp. III) 460(b)(3)) prohibits pre-induction judicial review of a I-A delinquency reclassification of a student formerly classified II-S.

STATUTES AND REGULATIONS INVOLVED

Section 10(b)(3) of the Military Selective Service Act of 1967 (50 U.S.C. App. (Supp. III) 460(b)(3)) provides, in pertinent part:

* * * * *

> No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title [section 462 of 50 U.S.C. App.], after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form: *Provided*, That such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant.

Section 6(h)(1) of the Military Selective Service Act of 1967 (50 U.S.C. App. (Supp. III) 456(h)(1)) provides:

Except as otherwise provided in this paragraph, the President shall, under such rules and regulations as he may prescribe, provide for the deferment from training and service in the Armed Forces of persons satisfactorily pursuing a full-time course of instruction at a college, university, or similar institution of learning and who request such deferment. A deferment granted to any person under authority of the preceding sentence shall continue until such person completes the requirements for his baccalaureate degree, fails to pursue satisfactorily a full-time course of instruction, or attains the twenty-fourth anniversary of the date of his birth, whichever first occurs. Student deferments provided for under this paragraph may be substantially restricted or terminated by the President only upon a finding by him that the needs of the Armed Forces require such action. No person who has received a student deferment under the provisions of this paragraph shall thereafter be granted a deferment under this subsection, nor shall any such person be granted a deferment under subsection (i) of this section if he has been awarded a baccalaureate degree, except for extreme hardship to dependents (under regulations governing hardship deferments), or for graduate study, occupation, or employment necessary to the maintenance of the national health, safety, or interest. Any person who is in a deferred status under the provisions of subsection (i) of this section, after attaining the nineteenth anniversary of the date of his birth, or who requests and is granted a student deferment under this paragraph, shall, upon the termination of such deferred status or

deferment, and if qualified, be liable for induction as a registrant within the prime age group irrespective of his actual age, unless he is otherwise deferred under one of the exceptions specified in the preceding sentence. As used in this subsection, the term "prime age group" means the age group which has been designated by the President as the age group from which selections for induction into the Armed Forces are first to be made after delinquents and volunteers.

32 C.F.R. 1642.4 provides, in pertinent part:

(a) Whenever a registrant has failed to perform any duty or duties required of him under the selective service law other than the duty to comply with an Order to Report for Induction (SSS Form No. 252) or the duty to comply with an Order to Report for Civilian Work and Statement of Employer (SSS Form No. 153), the local board may declare him to be a delinquent.

STATEMENT

On November 17, 1967, petitioner, a full-time undergraduate student of architecture at Cooper Union, was granted a II-S deferment from military service. On March 28, 1968, he received a notice declaring him delinquent for failing to keep his Selective Service registration certificate in his personal possession, as required by 32 C.F.R. 1617.1. On April 12, 1968,

32 C.F.R. 1602.7 defines "delinquent" as a person required to be registered under the selective service law, who fails or neglects to perform any duty required of him under the provisions of the selective service law. 32 C.F.R. 1642.4(a) provides that, "Whenever a registrant has failed to perform any

petitioner received a notice that he had been reclassified from II-S to I-A by his local board, pursuant to 32 C.F.R. 1642.12. He was then ordered to report on August 13, 1968, for induction into the Armed Forces.

Prior to the induction date, in August 1968, petitioner brought this pre-induction suit to have his induction enjoined and II-S classification reinstated. On August 12, 1968, the district court preliminarily enjoined petitioner's induction pending further consideration of the case (see Pet. 12-13). Subsequently, the Second Circuit, in *Breen* v. *Selective Service Local Board No. 16*, pending on petition for a writ of certiorari, No. 1141, this Term, held that Section 10(b)(3) of the Military Selective Service Act of 1967 (50 U.S.C. App. 460(b)(3)) bars pre-induction judicial review of delinquency reclassifications of undergraduate students for violation of Selective Service regulations. Accordingly, on February 17, 1969, the district court vacated the preliminary injunction and dismissed the complaint for lack of jurisdiction. On March 12, 1969, the court of appeals affirmed summarily on the authority of *Breen*.

ARGUMENT

The instant case presents precisely the same issues as those raised by petitioner in the *Breen* case, and

duties required of him under the selective service law * * * the local board may declare him to be a delinquent." "Selective service law" is defined to include "title I of the Military Selective Service Act of 1967 [50 U.S.C. App. §§ 451 et seq.] and all the rules and regulations issued thereunder." (32 C.F.R. 1602.10).

also closely parallels *Kolden* v. *Selective Service Board No. 4*, pending on petition for a writ of certiorari, No. 1175, this Term. For the reasons set forth in our opposition to the *Breen* petition, we submit that the instant petition for a writ of certiorari should also be denied.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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[1] In *Breen* the Second Circuit held that an undergraduate student is not entitled to pre-induction judicial review of his reclassification. The Eighth Circuit in *Kolden* reached the same conclusion with respect to graduate students.